IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1974 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AIYUB ALIAS ABU MAHAMMADKHAN PATHAN

Versus

COMMISSIONER OF POLICE AHMEDABAD

Appearance:

1. Special Civil Application No. 1974 of 2003

MR ANIL S DAVE for Petitioner No. 1

MR KAMEN N SHUKLA for Petitioner No. 1

MR RC KODEKAR ASSTT GOVERNMENT PLEADER for Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 13/06/2003

ORAL JUDGEMENT

#. Heard learned advocate Mr.Anil S. Dave appearing on behalf of the petitioner and learned AGP Mr.R.C.Kodekar

for respondents State.

Rule, in the present petition, issued on 28th February, 2003 making it returnable after a period of six weeks.

#. By way of this petition, the petitioner has challenged the order of detention dated 29th January, 2003 passed by the Commissioner of Police, Ahmedabad City under Section 3[1] of the PASA Act. Pursuant to the impugned detention order, the detenu has been detained in Porbandar District Jail as Class-II detenu.

#. Looking to the grounds of detention passed against the present petitioner, in all, two offences under the provisions of the Bombay Prohibition Act, have been registered against the petitioner and in respect of these two offences, the petitioner came to be arrested on 22nd January, 2003 in connection with first offence and for the second offence, the petitioner arrested on 24th January, 2003. That two unregistered offence disclosed by the secret witnesses against the petitioner and their statements dated 3rd January and 7th January, 2003 recorded by the sponsoring authority on 24th and 25th January, 2003 and thereafter, the order of detention has been passed by the detaining authority on 29th January, 2003. Affidavit-in-reply has been filed by the detaining authority as well as by the State Government, which are on record of this case and a copy thereof has been supplied to the present petitioner.

#. Learned advocate Mr.Anil S. Dave appearing on behalf of the petitioner has raised contention in para-10 of the petition that at the time when the order of detention has been passed, the petitioner was in judicial custody. He submitted that in connection with all two offences registered against the petitioner, the petitioner came to be arrested on dates referred above and he was in judicial custody. However, he stated at bar that for none of the offence, the petitioner has filed bail application before any of the competent Court of law. Therefore, he relying on the contentions raised in para-23 of the petition, submitted that once the petitioner was in judicial custody and no bail application has been filed by the petitioner, then it was the duty of the detaining authority to consider the question, whether is there any likelihood to file any bail application by the petitioner and in case, if any such bail application is filed, whether it is likely to be granted in favour of the petitioner by the competent criminal court. However, it is his contention that as

such, this aspect has not been considered, nor examined by the detaining authority for arriving at subjective satisfaction and therefore, the order of detention is vitiated on this ground only. However, Mr.Dave, learned advocate has relied on decisions of this Court in Special Civil Application Nos.2866, 2867 and 2868 of 2003 decided on 10th June, 2003.

#. Learned AGP Mr.R.C.Kodekar for the respondents has submitted that the detaining authority has filed detailed affidavit and specific answer given in para-21 to the contentions so raised interalia contending that the detenu was in judicial custody and he may be released on bail at any point of time and after releasing on bail, he would be indulged in the similar illegal activities, which can adversely affect maintenance of the public order. It is also contended that the detaining authority is not under obligation to pursue the remedy available under Section 437[5] of the Criminal Procedure Code for cancelation of bail. If said reply of the detaining authority is taken into consideration as it is, then also, it can be said that this specific reply is nothing but clear non application of mind on the part of the detaining authority inasmuch as from the grounds of detention itself, it is very clear that in all two offences, the petitioner came to be arrested on 22nd and 24th January, 2003 and the petitioner was in judicial custody. There is nothing on record before the detaining authority that any bail application was moved by the petitioner before the competent Court of Law in respect of any of the offences mentioned in the grounds of detention. It may be appreciated that there is no bail application at all filed by the petitioner and therefore, where is a question of cancellation of bail to adopt lesser drastic remedy at the ends of the detaining authority and this is nothing but clear non application of mind on the part of the detaining authority. Therefore, considering the entire records produced by the petitioner including the grounds of detention and the statements of the secret witnesses as well as the reply filed by the detaining authority, so also, by the State Government, according to my opinion, the contention which has been raised by the learned advocate Mr.Dave is squarely covered by the decision of this Court rendered in Special Civil Application Nos.2866, 2867 and 2868 /2003 dated 10th June, 2003 wherein this Court has examined this question relying upon the decision of the Apex Court that it is the duty of the detaining authority to examine the aspect whether there is any likelihood to file any bail application by the detenu in connection with registered offences and in case, if bail application

is filed, even then, there is any possibility to grant bail by the competent court. These aspects have been clearly ignored by the detaining authority and not at all examined by the detaining authority looking to the facts of the present case. Therefore, the decision of this Court rendered in the matters referred to above squarely cover the contention and controversy raised in this petition and resultantly, the detention order is required to be quashed and set aside.

#. For the reasons given in foregoing paragraphs, this petition succeed and the same is allowed. The impugned order of detention dated 29-1-2003 passed by the Commissioner of Police, Ahmedabad City is hereby quashed and set aside. The detenu - Aiyub @ Abu Mahammadkhan Pathan, detained at Porbandar District Jail, Porbandar be set at liberty if he is not required in any other case.

Rule is made absolute accordingly with no order as to costs.

Direct Service is Permitted.

Date.13.6.2003 [H.K.Rathod, J.]

#kailash#